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October 6, 2004

BY ELECTRONIC FILING

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Notification of Ex Parte*; WC Docket No. 03-171

Dear Ms. Dortch:

On October 6, 2004, Bret Mingo and Chris Van de Verg, of Core Communications, Inc. ("Core"), and the undersigned conducted a telephone conference with Scott Bergmann, Legal Advisor to Commissioner Adelstein. During the teleconference, Core demonstrated that the Commission should forbear from any application of the interim regime established by the *ISP Remand Order*.[1] Indeed, the forbearance provision of the Act requires the Commission to forbear from application of its rules and orders in cases where: (a) enforcement of such rules and orders is unnecessary to prevent unjust and unreasonable discrimination against carriers; (b) enforcement of such rules and orders is unnecessary to prevent unjust and unreasonable discrimination against consumers; and (c) forbearance is consistent with the public interest. Under this standard, the remanded *ISP Remand Order* regime simply cannot survive as its enforcement results in affirmative discrimination against carriers, affirmative discrimination against consumers, and in so doing, the *ISP Remand Order* contradicts the public interest. Core explained that this was particularly true with regard to the growth cap and new market provisions.

In addition, Core explained that the any carrier that feels that another carrier is improperly generating ISP-bound traffic has ample recourse to this Commission and in the courts. As one example, Core referenced the Commission's decision in *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp.*, File No. E-97-003, FCC 01-84 (Mar. 13, 2001) ("*Total*").[2] In *Total*, the Commission found that "Total

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[1] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 19 FCC Rcd 9151 (2001) ("*ISP Remand Order*") *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir 2002), *cert. denied*, 123 S. Ct. 1927 (2003).

[2] A copy of the *Total* decision is attached hereto at Tab A.

and Atlas violated section 201(b) of the Act by engaging in an unreasonable scheme to inflate the access fees charged to AT&T."[3] In particular, the Commission"

> [A]gree[d] with AT&T that Atlas created Total as a sham entity designed solely to extract inflated access charges from IXCs, and that this artifice constitutes an unreasonable practice in violation of section 201(b) of the Act. Our conclusion rests on the relationship between Atlas and Total; the evidence compels the conclusion that the two entities are not independent or competitive.[4]
>
> In sum, the arrangement between Total and Atlas serves only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to the Audiobridge chat line. We find that this corporate structure was a sham, and we will not permit Atlas to charge indirectly, through a sham arrangement, rates that it could not charge directly through its existing tariff.[5]

Accordingly, there can be no doubt that the Commission could use its enforcement authority to address any allegations that a carrier is improperly generating ISP-bound traffic. Similarly, the Bell Companies have demonstrated that they are more than able to file lawsuits in federal district court to address intercarrier compensation issues. A copy of two such complaints are attached hereto at Tab B.

Sincerely,

M. Hazzard /emc

Michael B. Hazzard
Counsel for Core Communication, Inc.

cc: Scott Bergmann (electronic mail)

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3 *Total* at ¶ 2.
4 *Id.* at ¶ 16.
5 *Id.* at ¶ 18.

TAB A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Total Telecommunications Services, Inc.,	)	
	)	
and	)	
	)	
Atlas Telephone Company, Inc.,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. E-97-003
	)	
AT&T Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2001 Released: March 13, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we deny a complaint filed by Total Telecommunications Services, Inc. ("Total") and Atlas Telephone Company, Inc. ("Atlas") (collectively, "Complainants") against AT&T Corporation ("AT&T") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[1] In particular, we find that, under the specific circumstances of this case, the provisions of the Communications Act on which Complainants rely do not prohibit AT&T from refusing to purchase terminating access services from Total or from blocking calls from AT&T customers to the sole end-user customer to which Total terminates traffic. Further, we grant in part and deny in part the counterclaim filed by AT&T against Total and Atlas. In particular, we grant AT&T's claim that

[1] 47 U.S.C. § 208.

Total and Atlas violated section 201(b) of the Act[2] by engaging in an unreasonable scheme to inflate the access fees charged to AT&T, and deny the remainder of AT&T's claims as either moot or meritless.

II. BACKGROUND

A. The Parties

2. Atlas is an incumbent local exchange carrier ("LEC") located in Big Cabin, Oklahoma that serves approximately 1500 end users. Atlas provides local exchange service to end user customers, and originating and terminating exchange access services to AT&T and other interexchange carriers ("IXCs").[3] Atlas charges IXCs access rates specified by the National Exchange Carrier Association ("NECA").[4]

3. Total was formed on May 26, 1995, and identifies itself as a competitive access provider ("CAP") in Oklahoma.[5] Although Total purports to be an independent entity that competes with Atlas in the access market, Total and Atlas actually have a "highly intertwined" and "symbiotic" relationship.[6] For example, the same person is both the President of Atlas and the Chairman of Total; Atlas and Total operate in the same geographic area; Total's sole end office is collocated in an Atlas end office building; all of Total's transmission facilities are leased from Atlas; and Total received a $20,000 startup loan from the Atlas pension fund.[7]

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[2] 47 U.S.C. § 201(b).

[3] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Answer and Cross Complaint of AT&T Corp., File No. E-97-03 (filed Dec. 24, 1996) at 30, ¶ 5 (Answer); *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Answer to Cross Complaint, File No. E-97-03 (filed Jan. 17, 1997) at 2, ¶ 5 (Answer to Cross Complaint); *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. American Telephone and Telegraph Company, Inc.*, 919 F. Supp. 472, 475-6 (D.D.C. 1996) (*Total and Atlas v. AT&T*), *aff'd mem.*, No. 96-7043 (D.C. Cir. 1996). *See also Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Brief of AT&T Corp., File No. E-97-03 (filed July 7, 1997) at 1 (AT&T Brief).

[4] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Complaint, File No. E-97-03 (filed Oct. 18, 1996) at 12, ¶ 64 (Complaint); Answer at 10, ¶ 64. FN12. Pursuant to the Commission's rules, NECA prepares and files access charge tariffs on behalf of "all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements." 47 C.F.R. § 69.601(a). Each participating company charges the rates appearing in those tariffs, pools its revenues with other participants, and receives an amount equal to its costs and its *pro rata* share of all earnings.

[5] Complaint at 2, 5-6, ¶¶ 4, 7, 23-24.

[6] *Total and Atlas v. AT&T*, 919 F. Supp. at 476, 482.

[7] AT&T Brief at 11; Answer at 30, ¶ 6; Answer to Cross Complaint at 2, ¶ 6; *Total*

4. Total's Tariff F.C.C. No. 1, filed on July 31, 1995, specifies the rates, terms, and conditions under which it offers access services.[8] Because Total is a "non-dominant" carrier, its tariff took effect on one day's notice.[9] The terminating access charges of Total exceed those of Atlas by 27 percent.[10]

5. During the relevant period, Total provided no local exchange service. Moreover, there was only one end-user customer to which Total terminated traffic: Audiobridge of Oklahoma, Inc. ("Audiobridge").[11] Audiobridge provides its customers a kind of multiple voice bridging service ("MVBS") commonly known as "chat-line" service.[12] This service connects incoming calls so that two or more callers can talk with each other simultaneously.[13] This differs from traditional conference call service in that callers to the chat line are randomly paired with other callers. In addition, unlike many chat-line operators, Audiobridge does not impose any charges on callers.

Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp., Total Telecommunications, Inc. Response To Interrogatories, File No. E-97-03, Response to Interrogatory No. 4 (Total's Response To Interrogatories) (describing the loan to Total from Atlas' pension fund); *Total and Atlas v. AT&T*, 919 F. Supp. at 475-6, 482.

[8] Complaint at 2, ¶ 6; Answer at 2, ¶ 6.

[9] Answer at 32-33, 34, ¶¶ 13, 16; AT&T Brief at 11. A carrier that has been found by the Commission to have market power (*i.e.*, the power to control prices) is considered "dominant." 47 C.F.R. § 61.3(o). All others are classified "non-dominant." Pursuant to section 61.23(c) of the Commission's rules then in effect, "[a]ll tariff filings of domestic and international non-dominant carriers must be made on at least one day's notice." 47 C.F.R. § 61.23(c) (1995). Tariffs for dominant carriers, however, were not effective until 30 days after filing. 47 C.F.R. § 61.59(a) (1995).

[10] AT&T Brief at 6. *See also Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Reply Brief of TTS/Atlas, File No. E-97-03 (filed July 28, 1997) at 9 (Complainants' Reply) (citing AT&T's assertion that Total's terminating access rates are 27% higher than those of Atlas, and, while not confirming this figure, admitting that Total's rates are "justifiably higher" that Atlas'). In early pleadings, AT&T alleged that Total's rates were ten times higher than those of Atlas, but it subsequently modified that claim. *See, e.g., Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Motion of AT&T Corp. To Dismiss or For Judgment on the Pleadings, File No. E-97-03 (filed Dec. 24, 1996) at 3 (AT&T's Motion to Dismiss).

[11] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Brief of Total Telecommunications, Inc. and Atlas Telephone Company, Inc., File No. E-97-03 (filed July 7, 1997) at 3 (Complainants' Brief); AT&T Brief at 2; *Total and Atlas v. AT&T*, 919 F. Supp. at 475. *See also* Transcript of Oral Argument, May 6, 1999, at 6-7 (Tr.).

[12] Complaint at 6, ¶ 29; Complainants' Brief at 3; AT&T Brief at 2,5.

[13] Complaint at 6, ¶ 29; Complainants' Brief at 3; Tr. at 11. *See also Total and Atlas v. AT&T*, 919 F.Supp. at 475 n.4.

Instead, Audiobridge obtains all of its revenues from Total, as described below.[14] Thus, callers to Audiobridge pay only their IXC for the calls, and pay only the IXC's tariffed, long-distance toll charges.[15]

6. During the period at issue here, when an AT&T subscriber placed a long distance call to Audiobridge in Big Cabin, Oklahoma, the call was initially handled by the subscriber's local telephone company. In this context, the local telephone company is known as the "originating access provider." The local telephone company transported the call to AT&T, which transported the call across AT&T's long distance network to an AT&T point of presence ("POP") located in an area of Oklahoma near Big Cabin served by Southwestern Bell Telephone Company ("Southwestern Bell"). From the AT&T POP, the call was transmitted through Southwestern Bell's facilities to a "meet point" with Atlas. Atlas carried the call over its facilities, switched the call through its access tandem switching equipment, and ultimately transported the call to a meet point with Total (the "terminating access provider"). Atlas charged AT&T a relatively modest fee for this tandem switching service pursuant to the NECA tariff. As the "terminating access provider," Total routed the call to its sole end user customer, Audiobridge. Total then separately billed AT&T for terminating access services.[16]

B. The Agreement Between Total and Audiobridge

7. On July 6, 1995, about three weeks before Total filed its first federal tariff, Total entered an agreement with Audiobridge whereby Total would pay Audiobridge commission payments of 50 to 60 percent of Total's terminating access revenues from calls completed to Audiobridge. In return, Audiobridge would market and otherwise aid the chat-line operations.[17] As mentioned above, the commission payments that Total pays to Audiobridge out of terminating access revenues constitute Audiobridge's only source of revenue.[18]

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[14] *See* AT&T Brief at 6.

[15] *See, e.g., Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition To Motion of AT&T To Dismiss or For Judgment On The Pleadings, File No. E-97-03 (filed Jan. 14, 1997) at 14; Complainants' Reply at 2.

[16] Complaint at 8, ¶ 40; Answer at 5, ¶ 40; Total's Response To Interrogatories, Response to Interrogatory No. 11.

[17] Total's Response To Interrogatories, Response to Interrogatory No. 1.

[18] AT&T Brief at 2, 6.

C. AT&T's Dealings With Atlas and Total in Late 1995

8. From July 1995 through October 1995, representatives of Total and AT&T negotiated over the installation of facilities necessary to handle the anticipated traffic between them. In order to transport and terminate such traffic, AT&T ultimately ordered from Atlas a total of 336 trunks to carry calls from AT&T customers to Total's end office, via Atlas' tandem.[19] Atlas itself also purchased additional facilities to support its part in the arrangement.[20]

9. On approximately August 1, 1995, Total began completing calls from AT&T customers to Audiobridge.[21] From August 1, 1995, to November 22, 1995, Total terminated approximately 10 million minutes of use for calls from AT&T customers to Audiobridge.[22]

10. Sometime in early September, 1995, AT&T contacted Total and questioned why AT&T should pay Total for access service, because AT&T had ordered trunk lines from Atlas, not from Total.[23] After a fruitless period of negotiation over Total's rates, AT&T notified Total by letter in early November, 1995 that it planned to terminate service between its customers and the end user served by Total (*i.e.*, Audiobridge) on the grounds that AT&T did not order such service, and had not been aware of Total's relationship with Atlas until AT&T received Total's bills.[24]

11. On November 22, 1995, after various warnings to Total, AT&T began blocking all calls from AT&T's customers to Audiobridge and declining to purchase access services from Total.[25] In other words, AT&T ceased connecting calls placed over its network intended for

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[19] Complaint at 8-11, ¶¶ 41-52; Answer at 5-8, ¶¶ 41-52. AT&T apparently ordered additional trunks from Atlas, instead of from Total, because AT&T was not directly interconnected with Total. Once AT&T delivered this traffic to Atlas' facilities, Atlas was obliged to transfer it to Total's end office. AT&T denies, however, that it intended to use these additional trunks exclusively to carry calls to Total. Answer at 7, ¶ 49.

[20] Complaint at 11, ¶ 52; Complainants' Brief at 17. AT&T responds that it is "without knowledge" on this issue, but does not dispute this allegation. Answer at 8, ¶ 52.

[21] Complaint at 11, ¶ 56; Answer at 8, ¶ 56.

[22] Complaint at 12, ¶ 63; Answer at 9, ¶ 63.

[23] Complaint at 14, ¶ 70; Answer at 11, ¶ 70.

[24] Complaint at 14-15, ¶¶ 72-74; Answer at 11, ¶¶ 72-74. *See* Answer at Attachment 8 (Nov. 7, 1995 Letter from Debbie H. Joyce, AT&T Corporation, to Dick Segress, President, Total Telecommunications Inc.).

[25] Complaint at 15-16, ¶¶ 74-81; Answer at 11-13, ¶¶ 74-81. *See also* Complainants' Brief at 4. Audiobridge thereafter began utilizing other telephone numbers through Total, which were not blocked by AT&T. It is unclear from the record whether, or how much, AT&T paid for the associated access charges for calls to these new numbers. *See* Transcript of Oral Argument, May 6, 1999, at 9-10 (Tr.). AT&T states that it was unaware of these

Audiobridge. In addition, AT&T refused to pay Total's bills for access charges for the period August through November 1995.[26] AT&T did pay, however, the corresponding tandem switching transport charges to Atlas.[27]

D. The Parties' Legal Claims

12. On October 18, 1996, Atlas and Total filed the instant complaint before the Commission.[28] Atlas and Total contend that AT&T's blockage of calls destined for Audiobridge via Total violates sections 201(a), 202(a), 214(a), and 251(a) of the Act.[29] Total seeks a Commission order permanently restraining and prohibiting AT&T from preventing its subscribers from completing telephone calls to Total's end-user customer. In addition, Total and Atlas seek the recovery of damages arising from AT&T's blocking of traffic, and reserve the right to file a supplemental complaint for damages pursuant to section 1.722 of the Commission's rules.[30]

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calls going to Total and Audiobridge until Total disclosed that fact in the instant formal complaint. AT&T thereupon requested Total to cease using that exchange number and any future new exchange numbers for Audiobridge's services, and stated that it would not pay associated access charges for such service. *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Reply Brief of AT&T Corp., File No. E-97-03 (filed July 28, 1997) at 7 n.5, Attachment B (AT&T Reply).

[26] Complaint at 16, ¶ 85. *See also Total and Atlas v. AT&T*, 919 F.Supp. at 476; Complainants' Brief at 17.

[27] Answer at 42-44, ¶¶ 53-65; *Total and Atlas v. AT&T*, 919 F.Supp. at 776. *See also* Tr. at 34.

[28] Complainants initially pursued relief in federal courts. First, Total brought suit against AT&T on November 24, 1995 in the United States District Court for the Northern District of Oklahoma. Complaint at 23-24, ¶ 128; Answer at 18, ¶ 128. This suit alleged violations of the Communications Act and sought preliminary injunctive relief and damages. After denying a preliminary injunction, the court referred the case to this Commission on November 30, 1995 pursuant to the primary jurisdiction doctrine. *Total and Atlas v. AT&T*, 919 F.Supp. at 477. Instead of pursuing the referral, Complainants "voluntarily dismissed" the action. Complaint at 24, ¶ 131; Answer at 18-19, ¶ 131. On December 13, 1995, immediately after entry of the dismissal order, Complainants filed a similar complaint before the United States District Court for the District of Columbia. On February 29, 1996, that court denied Complainants' requests for both a temporary restraining order and a preliminary injunction and referred the matter to this Commission under the doctrine of primary jurisdiction. *Total and Atlas v. AT&T*, 919 F.Supp. at 483-4. Furthermore, the court dismissed, rather than stayed, the action before it. *Id.* Complainants appealed the referral order to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the district court's opinion in an unpublished memorandum order issued on October 4, 1996. *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. American Telephone and Telegraph Company, Inc., aff'd mem.*, No. 96-7043 (D.C. Cir. Oct. 4, 1996). Ten days later, Complainants filed the instant complaint pursuant to the D.C. District Court's referral order.

[29] 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

[30] 47 C.F.R. § 1.722 (1997).

13. In response to Total's complaint, AT&T answered, *inter alia*, that the Act does not require AT&T to purchase unwanted access services from Atlas and Total. In addition, AT&T filed a cross-complaint[31] alleging that (1) Atlas and Total are violating section 201(b) of the Act by engaging in a scheme to circumvent the Commission's rules regarding dominant carriers[32] and pay-per-call services[33]; (2) Total is violating section 201(b) of the Act by charging unreasonably high access fees; (3) Atlas and Total are violating section 228 of the Act[34] by operating a pay-per-call service without employing a 900 number; (4) Total is violating section 203 of the Act[35] by seeking to preclude AT&T from exercising its right under Total's tariff to cancel service; (5) Atlas and Total are violating section 201(b) of the Act by charging AT&T for services that are not properly described in their respective tariffs; and (6) Total is violating section 203 of the Act by refusing to pay AT&T for the legal fees and costs that it incurred in the court actions described above, as required by Total's tariff. As relief, AT&T requests, *inter alia*, "an order requiring Atlas to pay as damages the approximately $150,000 that AT&T has been improperly charged, plus interest,"[36] plus other "damages in an amount to be determined," and injunctive relief.[37]

III. DISCUSSION

A. Introduction

14. As explained below, we conclude that Atlas created Total as a sham entity designed to impose increased access charges on calls made to Audiobridge. Because this conclusion about the relationship between Atlas and Total informs our decisions on Complainants' claims, we begin the discussion by examining AT&T's counterclaim that focuses on that relationship.

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[31] Although nominally captioned as a cross-complaint, we note that AT&T's pleading is essentially a counterclaim, and will be referred to as such throughout the remainder of this order.

[32] 47 C.F.R. Part 61.

[33] 47 C.F.R. §§ 64.1501-64.1515.

[34] 47 U.S.C. § 228.

[35] 47 U.S.C. § 203.

[36] Answer at 44-45, 46, 47, ¶¶ 66, 73, 78.

[37] Answer at 51.

B. Total and Atlas Violated Section 201(b) of the Act by Engaging in an Unreasonable Scheme to Inflate the Access Charges Assessed Against AT&T.

15. In Count II of its Counterclaim, AT&T argues that Atlas and Total violated section 201(b) of the Act by engaging in a scheme to inflate unreasonably the access charges assessed against AT&T.[38] In particular, AT&T claims that Total is not a legitimate CAP, but rather is a mere shell created by Atlas to extract an inflated "access charge" payment from AT&T.[39] AT&T asserts that Total and Atlas were able to charge rates for access services that were greater than those that would have been imposed by Atlas alone pursuant to its tariff. AT&T further argues that, although the Commission has permitted incumbent LECs to have separate affiliates that engage in competitive enterprises, it has never permitted this when the new affiliate provides the same service in the same geographic region as the incumbent LEC.[40]

16. We agree with AT&T that Atlas created Total as a sham entity designed solely to extract inflated access charges from IXCs, and that this artifice constitutes an unreasonable practice in connection with the provision of access service, in violation of section 201(b) of the Act. Our conclusion rests on the relationship between Atlas and Total; the evidence compels the conclusion that the two entities are not independent or competitive. As previously stated, the Complainants share a high ranking official: the same person is both President of Atlas *and* Chairman of Total. Moreover, Total received a $20,000 startup loan from Atlas' pension fund; Total's sole end office is collocated in an Atlas end office building; and all of Total's transmission facilities are leased from Atlas.[41] This record shows that Total's sole business activity was to provide IXCs with terminating access to a single party, Audiobridge, at rates significantly higher than those charged by Atlas for terminating access to every other customer in the area. Finally, the fact that 50 to 60 percent of Total's access revenues are used to finance the Audiobridge chat line lends support to our conclusion that Atlas created Total to increase access charges for calls to Audiobridge.

17. Complainants have not adequately rebutted the assertion that Total is not a legitimate independent entity. Complainants merely assert that Total intended to compete with Atlas, but was forced to withdraw its application to provide local exchange service in Oklahoma

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[38] Answer at 39-40, ¶¶ 35-40.

[39] Answer at 39-40, ¶ 37; AT&T's Motion to Dismiss at 21-22; AT&T Brief at 11.

[40] AT&T Brief at 12 (citing *Policies and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorized Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 575-79 (1983)).

[41] AT&T Brief at 3-4, 11; Answer at 30, ¶ 6; Answer to Cross Complaint at 2, ¶ 6;Total's Response To Interrogatories, Response to Interrogatory No. 4 (describing the loan to Total from Atlas' pension fund); *Total and Atlas v. AT&T*, 919 F. Supp. at 475-6, 482.

due to AT&T's opposition thereto.[42] Furthermore, Complainants argue that Total's "business relationship with Atlas does not violate the Commission's dominant carrier regulations,"[43] because "local telephone companies are perfectly free to have subsidiaries enter into competitive telecommunications markets and those subsidiaries have been treated by the Commission as non-dominant."[44] These arguments, however, avoid the heart of the matter. The fundamental issue is not whether Complainants have violated the Commission's dominant carrier regulations, or whether Total "intended" to compete with Atlas, but whether Total is truly an independent entity. On this point, Complainants have not provided any evidence (or argument) that AT&T's depiction of Total's relationship with Atlas is erroneous. Complainants have thus failed to convince us that Total and Atlas are independent entities.

18. In sum, the arrangement between Total and Atlas serves only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to the Audiobridge chat line. We find that this corporate structure was a sham, and we will not permit Atlas to charge indirectly, through a sham arrangement, rates that it could not charge directly through its existing tariff. Accordingly, we find in favor of AT&T on Count II of its Counterclaim.

C. Sections 201(a), 251(a), 214(a) and 202(a) of the Act Do Not Prohibit AT&T From Declining to Purchase Total's Terminating Access Services and Blocking Calls to Audiobridge.

1. Section 201(a) Does Not Require AT&T To Complete Calls To Audiobridge.

19. Complainants argue that section 201(a) of the Act requires AT&T to purchase Total's terminating access services and complete calls to Audiobridge.[45] The first clause of section 201(a) states: "It shall be the duty of every common carrier engaged in interstate or foreign

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[42] Complaint at 19, ¶ 103; Complainants' Reply at 3-4. Specifically, Complainants assert that AT&T "appeared before the Oklahoma Corporation Commission on [Total]'s application for local exchange service to raise questions regarding [Total]'s financial qualifications that ultimately forced [Total] to withdraw its application for the time being." Complaint at 19, ¶ 103. AT&T admits that it appeared before the Oklahoma Corporation Commission and opposed Total's application, but denies Total's characterization of the ultimate effect of this presentation. Answer at 16, ¶ 103.

[43] Complainants' Reply at 3.

[44] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition To Motion of AT&T To Dismiss or For Judgment On The Pleadings, File No. E-97-03 (filed Jan. 14, 1997) at 9-10.

[45] Complaint at 20-21, ¶¶ 105-112. *See also* Complaint at 27-38, ¶¶ 143-173; Complainants' Brief at 5-7; Complainants' Reply at 6-7.

communication by wire or radio to *furnish* such communication service upon *reasonable* request therefor."[46] The second clause of section 201(a) requires an interstate common carrier "to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes," but only if "the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest."[47]

20. Complainants assert that section 201(a) requires AT&T to maintain its interconnection with Total, continue to purchase Total's terminating access services, and refrain from blocking traffic to Audiobridge. Complainants argue that the first clause of section 201(a) requires AT&T to "furnish . . . communication service" to Total and Audiobridge, even though the Commission has not made any of the public interest findings required under the second clause of section 201(a).[48] In bringing this claim, Complainants purport to step into the shoes of AT&T's customers who are trying to call Audiobridge. Specifically, Complainants assert that a "reasonable request" for AT&T to "furnish" a communications service is made each time a caller — *i.e.*, an AT&T customer — dials the particular number of a party that the caller desires to reach.[49] Hence, because AT&T's customers attempting to reach Audiobridge have dialed Audiobridge's number, they allegedly have made a "reasonable request" for service, which AT&T must honor under the first clause of section 201(a).

21. Even assuming, *arguendo*, that we must address a claim brought by Atlas and Total on behalf of someone other than themselves, *i.e.*, AT&T's customers, we conclude that Complainants' claim lacks merit. As stated above, section 201(a) obligates AT&T to furnish service only upon "reasonable" request. If an AT&T customer asks AT&T to provide a service that would require AT&T to transport traffic to a carrier that charges an unlawful rate to terminate the traffic, the customer's request is not "reasonable" under section 201(a). Here, we have previously concluded that Total's access rate was unlawful because it represented an attempt by Atlas to charge, through a sham arrangement, access rates it was not otherwise permitted to charge under its existing tariff. Requests by AT&T's customers to send traffic to Audiobridge via Total do not constitute "reasonable requests" for service for purposes of section 201(a), because they would require AT&T to purchase access service that we have previously determined is unreasonably priced and the product of a sham arrangement. Thus, we conclude that section 201(a) does not require AT&T to purchase Total's terminating access services or to

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[46] 47 U.S.C. § 201(a) (emphasis added).

[47] *Id.*

[48] 47 U.S.C. § 201(a). *See* Complaint at 28-32, ¶¶ 143-157; Complainants' Brief at 6-7.

[49] Complaint at 28, ¶ 146.

refrain from blocking calls to Audiobridge.[50] Accordingly, we deny Count One of the Complaint.

2. Section 251(a) Does Not Require AT&T To Complete Calls To Audiobridge.

22. Complainants argue that section 251(a)(1) of the Act requires AT&T to purchase Total's terminating access services and refrain from blocking calls to Audiobridge.[51] Section 251(a) states, in pertinent part, that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[52] Complainants argue that Atlas, Total, and AT&T are all telecommunications carriers within the meaning of section 251(a), and that, therefore, AT&T must interconnect with Total.[53] Furthermore, Complainants argue that a carrier's duty to "interconnect" under section 251(a) encompasses a duty to transport and terminate all traffic bound for any other carrier with which it is physically linked.[54] According to Complainants, in order to meet this obligation, AT&T has the legal duty under section 251(a) to purchase Total's access services at Total's tariffed rates for those services, and deliver to Total all calls made by AT&T's customers to Audiobridge.[55]

23. Complainants base their argument on an erroneous interpretation of the term "interconnect" in section 251(a)(1). We have previously held that the term "interconnection" refers solely to the physical linking of two networks, and *not* to the exchange of traffic between networks. In the *Local Competition Order*, we specifically drew a distinction between "interconnection" and "transport and termination," and concluded that the term "interconnection," as used in section 251(c)(2),[56] does not include the duty to transport and

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[50] Our ruling should not be construed to address the broader question of what other circumstances might permit an IXC to refuse to purchase, or discontinue purchasing, access service from a competitive LEC. That is an issue about which the Commission has previously sought comment, and it is currently under consideration. *See Access Charge Reform*, Fifth Report & Order & Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14342, ¶ 242 (1999).

[51] Complaint at 21, 39, ¶¶ 113-115, 176.

[52] 47 U.S.C. § 251(a).

[53] Complainants' Brief at 8; Complainants' Reply at 8.

[54] *See, e.g.*, Complainants' Brief at 10 (stating that "AT&T must cease blocking calls to [Total] under section 251(a) — it must interconnect.").

[55] Complaint at 38-41, ¶¶ 174-180; Complainants' Brief at 7-10; Complainants' Reply at 7-9.

[56] 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point and on rates, terms, and conditions that are just, reasonable, and nondiscriminatory).

terminate traffic.[57] Accordingly, section 51.5 of our rules specifically defines "interconnection" as "the linking of two networks for the mutual exchange of traffic," and states that this term "does not include the transport and termination of traffic."[58]

24. Complainants argue that the term "interconnection" has a different meaning in section 251(a) than in section 251(c).[59] According to Complainants, section 251(a) blends the concepts of "interconnection" and "transport and termination," and "the only way for AT&T and [Total] to interconnect under Section 251(a)(1) is for AT&T to purchase [Total]'s services at its tariffed rate."[60]

25. We find nothing in the statutory scheme to suggest that the term "interconnection" has one meaning in section 251(a) and a different meaning in section 251(c)(2). The structure of section 251 supports this conclusion. Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligations on incumbent LECs. Thus, section 251 of the Act "create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved."[61] As explained above, section 251(c) does not require incumbent LECs to transport and terminate traffic as part of their obligation to interconnect. Accordingly, it would not be logical to confer a broader meaning to this term as it appears in the less-burdensome section 251(a).

26. Furthermore, among the subparts of this provision, section 251(b)(5) establishes a duty for all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[62] Local exchange carriers, then, are subject to

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[57] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15590, ¶ 176 (1996) (*Local Competition Order*), *aff'd in relevant part, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)(*CompTel v. FCC*); *aff'd in part, vacated in part, Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *cert. granted, AT&T Corp. v. Iowa Utilities Bd.*, 522 U.S. 1089 (1998); *aff'd in part, reversed in part, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), *opinion after remand, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 14 FCC Rcd 5263 (1999) (subsequent history omitted).

[58] 47 C.F.R. § 51.5.

[59] Complainants' Reply at 8.

[60] *Id.* at 8-9.

[61] *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6937-38 ¶ 19 (1997).

[62] 47 U.S.C. § 251(b)(5).

section 251(a)'s duty to interconnect *and* section 251(b)(5)'s duty to establish arrangements for the transport and termination of traffic. Thus, the term interconnection, as used in section 251(a), cannot reasonably be interpreted to encompass a general requirement to transport and terminate traffic. Otherwise, section 251(b)(5) would cease to have independent meaning, violating a well-established principle of statutory construction requiring that effect be given to every portion of a statute so that no portion becomes inoperative or meaningless.[63] Moreover, section 252 of the Act indicates that "interconnection" and "transport and termination" are separate and distinct duties.[64] Section 252 establishes a process for the negotiation and arbitration of intercarrier agreements, and this process involves separate pricing standards for interconnection on the one hand, and for transport and termination of traffic on the other.[65] It would be difficult to reconcile these separate pricing standards if the requirement to interconnect incorporated a requirement to transport and terminate traffic.

27. In sum, we conclude that section 251(a) does not require AT&T to purchase Total's terminating access services and refrain from blocking calls to Audiobridge. Section 251(a) only requires AT&T to provide direct or indirect physical links between itself and Complainants. Accordingly, we deny Count Two of the Complaint.

3. Section 214(a) Does Not Require AT&T To Complete Calls To Audiobridge.

28. In Count Three of their Complaint, Complainants argue that AT&T violated section 214(a) by discontinuing service to Audiobridge without the prior consent of the Commission.[66] Section 214(a) provides, in pertinent part: "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected."[67] Complainants assert that the "discontinuance of service" provision of section 214(a) applies to intercarrier connections, and not just to connections between carriers and their end users.[68] Moreover, Complainants argue

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[63] *See, e.g., Cablevision Systems Development Company v. Motion Picture Association Of America, Inc.*, 836 F.2d 599, 610 (D.C. Cir. 1988); *Norfolk & W. Ry. v. United States*, 768 F.2d 373, 379 (D.C.Cir.1985), *cert. denied*, 479 U.S. 882 (1986).

[64] 47 U.S.C. § 252.

[65] *Compare* 47 U.S.C. § 252(d)(1) *with* 47 U.S.C. § 252(d)(2).

[66] Complaint at 21-22, ¶¶ 116-120; Complainants' Brief at 11-14.

[67] 47 U.S.C. § 214(a).

[68] Complaint at 43-44, ¶¶ 186-87; Complainants' Brief at 11-12.

that the section 214(a) certification requirement applies to non-dominant carriers like AT&T, and even when other competing carriers are providing the same or similar service through the use of access codes.[69]

29. We conclude that AT&T was not required to obtain section 214(a) authorization before discontinuing its service of terminating calls to Total. Although Complainants are correct that a non-dominant carrier must receive a section 214 certification prior to terminating an inter-carrier connection that will result in discontinuing, reducing, or impairing service to a community or part of a community, we find that "service to a community or part of a community" has not been discontinued, reduced, or impaired in this instance. We accept AT&T's uncontroverted assertions that it continues to complete calls to all residents and businesses in Big Cabin, Oklahoma *other than* Audiobridge. In other words, AT&T completes all calls that are placed pursuant to lawful access charge arrangements.

30. There is no evidence that AT&T has discontinued service to a "community, or part of a community" as is necessary to trigger section 214 authorization. AT&T's decision to discontinue service to Total has affected only one end user, Audiobridge; AT&T continues to originate and terminate traffic to all other residents and businesses in Big Cabin, Oklahoma. Complainants have failed to demonstrate that Audiobridge constitutes a "community or part of a community" for purposes of section 214. Based on the record before us, such a population of one end user does not comprise a community, or even a part of a community, as those terms are commonly understood.[70] Concluding otherwise would not only contradict the plain language of the statute, but also cause absurdly burdensome results. For example, a carrier would require a section 214 certification prior to terminating service to a single customer due to the not-uncommon occurrence of nonpayment of bills. This would unduly undermine a carrier's ability to take appropriate action in response to a customer's unwarranted failure to pay for service.[71] Section 214 requires the Commission to consider the impact that discontinuation of a service will have on a community, or a portion of a community, not the impact such discontinuation will have on an individual subscriber.

31. AT&T's conduct surely has had a significant financial impact on Total, but such

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[69] Complainants' Brief at 12-13.

[70] *Cf. Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2597 ¶ 38 & n.94 (1993) (noting that "community" can also "include an economic community of users, such as international record carriers or domestic satellite carriers"). *See also Inquiry Into Problems of Public Coast Radiotelegraph Stations*, Memorandum Opinion and Order, 67 FCC 2d 790, 794 ¶ 9 & n.15 (1978) (same).

[71] We need not — and do not — decide here whether AT&T would need section 214 authorization under similar circumstances before discontinuing service to more than one customer.

an impact on Total is irrelevant under section 214. Rather, the relevant focus is the impact on the community of end-users. As the Commission has previously indicated:

> In determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public. Thus, in situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.[72]

Here, the ultimate impact on the community served is minimal because, as stated above, AT&T continues to complete calls to all residents and businesses in Big Cabin, Oklahoma *other than* Audiobridge. To the extent that Audiobridge has legitimate communications needs, there is no reason it cannot make alternative lawful arrangements that would enable it to use AT&T or any other IXC. Accordingly, we deny Count Three of the Complaint.

4. Section 202(a) Does Not Require AT&T To Complete Calls to Audiobridge.

32. In Count Four of their Complaint, Complainants argue that AT&T is violating section 202(a) of the Act by blocking calls to Audiobridge.[73] Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services, . . . or to make or give any undue or unreasonable preference or advantage to any particular person."[74] Complainants argue that, when an AT&T customer places a long distance call, AT&T has the legal duty to ensure that the call is carried to completion.[75] Complainants contend that AT&T is unlawfully discriminating against Total and Atlas by refusing to terminate calls to Audiobridge, while continuing to deliver access traffic to other local exchange carriers. According to Complainants, AT&T has no discretion to refuse calls to specific numbers in areas it has chosen to serve.[76] Finally, Complainants assert that AT&T participates in chat-line arrangements similar to the one at issue here, so AT&T cannot lawfully choose to serve some chat lines and not others.[77]

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72 *Western Union Tel. Co.*, Memorandum Opinion and Order, 74 FCC 2d 293, 296 (1979).

73 Complaint at 22-23, ¶¶ 121-127; Complainants' Brief at 18-20.

74 47 U.S.C. § 202(a).

75 Complaint at 47, ¶ 195; Complainants' Brief at 20.

76 *Id.*

77 Complainant's Brief at 20-23; Complainants' Reply at 3.

33. There is a well-established, three-pronged test for determining whether a carrier's conduct violates the anti-discrimination provision of section 202(a): (1) whether the services at issue are "like"; (2) if the services are "like," whether the carrier treats them differently; and (3) if the carrier treats the services differently, whether the difference is reasonable.[78] If the complainant in a section 208 proceeding meets its burden of proving like service and disparate treatment, the burden of proof shifts to the defendant to prove that the disparate treatment is reasonable.[79]

34. Even assuming, *arguendo*, that Complainants have satisfied their burden of proving the first two prongs of the anti-discrimination test, Complainants' claim under section 202(a) fails, because AT&T has satisfied its burden of proving the reasonableness of the disparate treatment. That is, AT&T has shown that, under the particular circumstances of this case, AT&T's allegedly discriminatory conduct was not unreasonable. We find that AT&T's conduct was perfectly reasonable in view of the fact that Total and Atlas engaged in an unlawful scheme to inflate unjustly the access fees charged to AT&T.

35. We have decided that, under the unique circumstances of this case, AT&T's decisions to discontinue purchasing terminating access services from Total and to block traffic to Audiobridge did not violate sections 201, 202, 214, or 251 of the Act. Our decision does not mean, however, that an IXC has *carte blanche* to discontinue purchasing a CLEC's access services at any time or in any manner it chooses. In pending proceedings, the Commission will determine (i) what circumstances, if any, other than the unique ones present here permit an IXC to discontinue purchasing a CLEC's access services, and (ii) the procedures an IXC must follow to execute such a discontinuance, if permitted.[80] In the meantime, IXCs should not view this order as authorizing them unilaterally to block access traffic whenever they believe that a CLEC's rates are too high. In addition, we note that AT&T's decision to discontinue purchasing Total's terminating access services, and our decision to find AT&T's conduct lawful on the

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[78] *See, e.g., MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Allnet Communications Serv., Inc. v. US West, Inc.*, 8 FCC Rcd 3017, 3025, ¶ 38 n.87 (1993).

[79] *See, e.g., Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5903, ¶ 131-32 (1991); *PanAmSat Corp. v. Comsat Corp.*, 12 FCC Rcd 6952, 6965, ¶ 34 n.90 (1997); *C.F. Communications Corp. v. Michigan Bell Tel. Co.*, 12 FCC Rcd 2134, 2141-42, ¶ 15 n.47 (1997); *The People's Network Inc. v. American Tel. & Tel.*, 12 FCC Rcd 21081, 21093, ¶ 25 n.72 (Com. Car. Bur. 1997).

[80] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999). *See also Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, Public Notice, 15 FCC Rcd 10181 (Com. Car. Bur. 2000); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, Public Notice, 2000 WL 217601 (Com. Car. Bur. rel. May 15, 2000).

unique record of this case, do not render Audiobridge inaccessible to future customers. AT&T is a non-dominant IXC and any party wishing to reach Audiobridge may "dial around" to the network of another IXC to complete the call. Accordingly, Count Four of the Complaint is denied.[81]

D. The Unlawful Nature of the Complainants' Relationship, Standing Alone, Does Not Make it Unreasonable for Complainants to Charge a "Reasonable Amount" For Complainants' Access Services Provided Prior to the Blocking of Calls to Audiobridge.

36. In its request for relief, AT&T essentially seeks, *inter alia*, an order prohibiting Complainants from charging any access fees from AT&T. For the reasons described below, we grant that request in part, and deny it in part.

37. We reject AT&T's argument that the unlawful relationship between Atlas and Total, in and of itself, makes it unreasonable for Total to charge anything for the access services provided to AT&T. Complainants did provide a service to AT&T, *i.e.*, completing calls from AT&T's customers to Audiobridge. Moreover, AT&T recovered revenue through ordinary long-distance rates from its own customers for calls completed to Audiobridge. Finally, Complainants may not be able to recover their legitimate costs, if any, through other means, that they are entitled to recover. Therefore, Total's unlawful relationship with Atlas, standing alone, does not preclude Complainants from charging "reasonable" access charges from AT&T.[82]

38. Given the particular circumstances of this case, we conclude that a reasonable access charge is the fee that Atlas would have charged AT&T for terminating traffic directly to Audiobridge, had Total never existed.[83] We so conclude because (1) Total and Atlas were effectively the same entity, (2) Total serves the same territory as Atlas, simply providing service to

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[81] Complainants also allege, and AT&T admits, that callers who dial Audiobridge receive AT&T's standard error message: "Your call cannot be completed as dialed. Please check the number and dial again." Complainants' Brief at 23; Answer at 15-16, ¶ 99. AT&T also admits that its operators state that calls to Audiobridge "are being restricted from receiving calls from AT&T due to a service problem." Answer at 15-16, ¶ 99; AT&T Reply at 9. Complainants do not state a claim for relief arising from this conduct. Nevertheless, we note that AT&T's conduct is potentially problematic to the extent that the messages misstate (or omit) the reason that such calls cannot be completed.

[82] We note that, although Complainants' complaint refers to AT&T's failure to pay certain access charges incurred before AT&T began blocking calls to Audiobridge, Complaint at 16, ¶ 85, the complaint does *not* state a claim for relief based on that conduct. Instead, all of Complainants' claims for relief only concern AT&T's blockage of calls to Audiobridge. Thus, we have no basis on which to award pre-blocking damages to Complainants, either in this order or in response to a supplemental complaint for damages.

[83] According to Complainants, Atlas' per-minute terminating access fee was $0.0663. *See* Tr. at 81.

a single customer in that territory, and (3) the record contains no evidence that Atlas' rate (which was a NECA rate), had it been charged, would have been unreasonably high or low. Consequently, we grant AT&T's request for relief as against Complainants such that Total may not charge AT&T access fees in any amount exceeding the amount that Atlas would have charged AT&T for the same services.

39. We reject, however, AT&T's request for an order precluding Total from attempting to charge anything more than a fraction of a penny per minute for its terminating access services.[84] AT&T argues that Total is actually a dominant carrier and, as a result, should have based its rates on its actual costs and traffic volume, in accordance with the Commission's dominant carrier rate-of-return regulations.[85] AT&T calculates that compliance with these regulations would have reduced Total's access rates to approximately one-tenth of one penny per minute.[86] We have already held that Total is an alter-ego of Atlas, rather than a separate entity, for the purpose of determining a reasonable access rate. Accordingly, it is not appropriate to calculate a reasonable fee based on Total's costs and revenues; instead, it is Atlas' experience, had Total not existed, that is relevant. Here, however, Atlas subscribed to the NECA tariff, which pools the experience of a large number of carriers nationwide to determine the appropriate rates for those carriers. One important feature of the NECA tariffing process is that, due to the large number of participating carriers, a sudden increase or decrease in costs or traffic by one carrier will have a marginal, if any, impact on the rates filed by NECA. There is no evidence in the record that, absent the existence of Total, Atlas would have filed its own tariff instead of subscribing to the NECA tariff. Moreover, there is no evidence in the record that, had the additional traffic generated by Audiobridge been attributed to Atlas rather than Total, the NECA rate to which Atlas subscribed would have decreased.[87]

40. Finally, AT&T also seeks damages from Atlas equaling the charges that AT&T paid to Atlas for "tandem switched transport."[88] But for its unlawful relationship with Total, Atlas would not have charged AT&T anything at all for tandem switched transport to Total; instead,

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[84] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, AT&T Notice of Supplemental Authorities, File No. E-97-03 (filed May 26, 1999) at 8-10.

[85] 47 C.F.R. §§ 61.31-61.59.

[86] *Id.* at 10.

[87] Because we grant AT&T's claim in Count II that Total's relationship with Atlas violates section 201(b) of the Act, we need not and do not reach the issue raised in Count I of whether Total's relationship with Atlas also violates the Commission's dominant carrier regulations (47 C.F.R. Part 61) and section 212 of the Act, 47 U.S.C. § 212. *See* Answer at 37-38, ¶¶ 28-30; AT&T Brief at 11-14.

[88] Answer at 42-45, ¶¶ 53-66; AT&T's Motion to Dismiss at 26.

Atlas would have charged AT&T only for terminating access directly to Audiobridge. Thus, we grant AT&T's request for damages as against Atlas in the amount that AT&T paid to Atlas for tandem switched transport, plus interest.[89]

E. AT&T's Remaining Counterclaims Are Rejected.

1. AT&T's Claims That the Relationship Between Total and Audiobridge Violates Sections 228 and Section 201(b) of the Act Are Dismissed as Moot.

41. In Counts I and III of its Counterclaim, AT&T argues that the revenue-sharing arrangement between Total and Audiobridge violates sections 228 and 201(b) of the Act.[90] We dismiss these claims as moot, without prejudice. Even assuming, *arguendo*, that we were to find that Complainants violated either section 228 or 201(b) of the Act, AT&T would still not be entitled to any relief that has not already been awarded. This is because Complainants' alleged violation of section 201(b) or section 228 of the Act, standing alone, would not vitiate AT&T's obligation to pay a reasonable access charge for services already provided. Accordingly, Counts I and III of AT&T's Counterclaim are dismissed as moot, without prejudice.

2. AT&T's Claim That Total's Tariff Precludes Total from Attempting to Prevent AT&T's Blocking Is Dismissed as Moot.

42. In Count IV of its Counterclaim, AT&T asserts that Total's attempts to prevent AT&T from refusing to purchase Total's access service violate Total's tariff, because Total's tariff permits AT&T to cancel service with thirty day's notice.[91] Given that we have already denied Total's attempt to prevent AT&T from refusing to purchase Total's access service, we dismiss as moot Count IV of AT&T's Counterclaim, without prejudice.

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[89] The parties must compute interest on the total amount of tandem switched transport charges paid by AT&T to Atlas for calls routed to Total, and covering the time period beginning November 22, 1995 (the date that AT&T began blocking calls to Total) and concluding on the date Atlas provides full payment to AT&T. To calculate the amount of accrued interest, the parties shall use the appropriate I.R.S. rate for corporate overpayments. *See, e.g., Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc. and Bell Atlantic Network Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11754, 11763, ¶ 26 (2000); *MCI Telecom. Corp. v. Pacific Northwest Tel. Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1517, 1529-30, ¶¶ 46-48 (1993).

[90] Answer at 37-38, 40-41, ¶¶ 27-34, 41-48; AT&T Brief at 23; AT&T's Motion to Dismiss at 20-24.

[91] Answer at 41-42, ¶¶ 49-52.

3. AT&T's Claims that the Applicable Tariffs Erroneously Describe the Services at Issue are Dismissed as Moot.

43. In Counts V through IX of its Counterclaim, AT&T alleges that Atlas and Total violated sections 201(b) and 203 of the Act by assessing charges for services not accurately described in their tariffs.[92] It is well established that a purchaser of telecommunications services is not absolved from paying for the rendered services solely because the services furnished were not properly encompassed by the carrier's tariff (where, as here, the provider has no other means of attempting to obtain compensation).[93] Thus, even assuming, *arguendo*, that Atlas' and Total's tariffs do not accurately describe the services provided by them to AT&T, AT&T's claims in Counts V – IX are moot, because in response to Count II we have awarded AT&T all of the relief to which it would be entitled under Counts V - IX: an order (1) precluding Total from attempting to collect any amount greater than the amount that Atlas would have charged for the same service under its tariff, and (2) requiring Atlas to pay damages to AT&T in the amount that AT&T paid Atlas for tandem switching services, plus interest. Thus, we dismiss as moot Counts V through IX of AT&T's Counterclaim, without prejudice.

4. Total's Refusal to Pay AT&T's Attorney's Fees and Costs In the Court Actions Does Not Violate Total's Tariff.

44. In Count X of its Counterclaim, AT&T alleges that Total has unlawfully refused AT&T's request for legal costs and fees incurred by AT&T while defending the underlying federal court actions.[94] AT&T points out that, under Total's tariff, in any action to enforce the tariff, "the prevailing party shall be entitled to recover its legal fees and court costs from the non-prevailing party."[95] According to AT&T, it was the "prevailing party" in the court actions described above, because the courts denied Total's requests for preliminary injunctive relief and granted AT&T's requests for referral to the Commission under the primary jurisdiction doctrine.[96]

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[92] Answer at 42-48, ¶¶ 53-89; AT&T Brief at 24-25; AT&T Reply at 8.

[93] *See New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5132-33, ¶ 10 (2000), *affirming New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com.Car.Bur. 1993).

[94] Answer at 48-50, ¶¶ 90-99.

[95] *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition of AT&T Corp. to Motion to Dismiss, File No. E-97-03, at 15 (filed Feb. 5, 1997).

[96] *Id.* at 16-17.

45. We disagree with AT&T. Even assuming that we have authority to enforce a tariff provision regarding the payment of legal fees and costs, we are not convinced that the tariff provision was triggered. In the absence of any evidence in the record regarding the meaning of the term "prevailing party" in Total's tariff, we construe the term to mean a party that obtains in its favor a final, unappealable order resolving the dispute at issue. AT&T did not previously obtain such an order regarding the dispute at issue here. The court decisions merely denied Total's requests for preliminary relief and referred the dispute to the Commission for further adjudication. Because the court decisions do not make AT&T a "prevailing party" within the meaning of Total's tariff, we deny Count X of AT&T's Counterclaim.

IV. MISCELLANEOUS MATTERS

46. Total's Petition for Immediate Restoration of Connection, filed November 1, 1996, is denied for the reasons discussed above. AT&T's Motion to Dismiss or for Judgment on the Pleadings, filed December 24, 1996, and Total's Motion to Dismiss Cross Claim, filed January 25, 1997, are denied as moot. Total's Motion to Accept Supplement to Record, filed April 11, 1997, concerning evidence that AT&T itself has provided teleconferencing services of the kind it opposes in this proceeding, is granted. Total's Motion to Accept Supplement to Record, filed December 3, 1997, concerning AT&T's alleged inconsistent representations to the California Public Utilities Commission on the issues of blocking and interconnection, is granted.

V. ORDERING CLAUSES

47. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, 206, 207, 208, 214, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 206, 207, 208, 214, 251, that the above-captioned complaint filed by Total IS DENIED IN ITS ENTIRETY.

48. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 206, 207, 208, 212, 214, and 228 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 207, 208, 212, 214, 228, that the cross complaint filed by AT&T IS GRANTED IN PART, DISMISSED IN PART WITHOUT PREJUDICE, AND DENIED IN PART to the extent specified herein.

49. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 206, 207, 208, and 209, that Atlas shall pay AT&T damages in the amount that AT&T paid to Atlas for tandem switched transport for calls ultimately routed to Total, plus prejudgment interest computed from November 22, 1995 to the date of release of this Order at the appropriate

I.R.S. rate for corporate overpayments. Atlas shall pay this amount to AT&T within 90 days of the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

TAB B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Telephone Company, and The Woodbury Telephone Company,

Plaintiffs,

v.

AT&T Corp., AT&T, Inc., AT&T Communications, Inc., AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., TCG St. Louis, Inc., AT&T Communications of Texas, L.P., TCG Dallas Holdings I, Inc., TCG Dallas Holdings II, Inc., Teleport Communications Houston, Inc., AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG Joint Venture Holdings, TCG San Francisco Holdings I, Inc., AT&T Communications of Nevada, Inc., AT&T Communications of Michigan, Inc., TCG Detroit Holdings I, Inc., TCG Detroit Holdings II, AT&T Communications of Illinois, Inc., AT&T Communications of Indiana, TCG Indianapolis, Inc., AT&T Communications of Ohio, Inc., TCG New York, Inc., AT&T Communications of Wisconsin I, L.P., TCG Milwaukee, Inc., TCG Connecticut Holdings, Inc., TCG Connecticut Holdings II, Inc., and JOHN DOES 1-10,

Defendants.

Case No. _____

JURY TRIAL REQUESTED

COMPLAINT

Plaintiffs Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Telephone Company, and The Woodbury Telephone Company (collectively "SBC"), for its complaint against defendants AT&T Corp., AT&T, Inc., AT&T Communications, Inc., AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., TCG St. Louis, Inc., AT&T Communications of Texas, L.P., TCG Dallas Holdings I, Inc., TCG Dallas Holdings II, Inc., Teleport Communications Houston, Inc., AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG Joint Venture Holdings, Inc., TCG San Francisco Holdings I, Inc., AT&T Communications of Nevada, Inc., AT&T Communications of Michigan, Inc., TCG Detroit Holdings I, Inc., TCG Detroit Holdings II, Inc., AT&T Communications of Illinois, Inc., AT&T Communications of Indiana, TCG Indianapolis, Inc., AT&T Communications of Ohio, Inc., TCG New York, Inc., AT&T Communications of Wisconsin I, L.P., TCG Milwaukee, Inc., TCG Connecticut Holdings, Inc., TCG Connecticut Holdings II, Inc., and JOHN DOES 1-10 (collectively "AT&T"), allege as follows:

NATURE OF THE ACTION

1. This case involves AT&T's failure to pay legally required charges for its use of SBC's local network facilities to complete long-distance calls. Whenever one of AT&T's long-distance customers makes a long-distance call to an SBC local telephone customer, AT&T uses SBC's local facilities to complete, or "terminate," the AT&T long-

distance call. Pursuant to federal and state tariffs on file with the Federal Communications Commissions ("FCC") and state regulatory bodies, AT&T is required to pay SBC for this "access" to SBC's local exchange facilities. Beginning in or around 2000 and continuing through the present, however, AT&T orchestrated and implemented a fraudulent scheme to avoid these tariffed "access charges" by delivering its long-distance calls to SBC for termination over facilities that AT&T obtained under the express condition that they be used for local traffic, and thereby disguising its long-distance calls as local calls. That scheme continues to this day, and SBC accordingly seeks not only to recover the exchange access charges that AT&T has unlawfully avoided – which SBC estimates to be at least $141 million and possibly much more – but also to enjoin AT&T from perpetuating its unlawful conduct.

2. AT&T has sought to justify its access-avoidance scheme primarily on the theory that long-distance calls should be exempt from access charges whenever AT&T converts them from the "circuit-switched" protocol in which ordinary long-distance calls originate to a communications protocol known as the "Internet Protocol," or "IP," and carries them for some distance on its Internet backbone. AT&T has taken this position even though it converts these calls back to the circuit-switched protocol before handing them off to SBC for delivery to the called party; even though these calls are placed in the same manner and using the same facilities as an ordinary telephone call; even though neither the calling nor called party has any idea that this "protocol conversion" has taken place; even though AT&T has continued to bill these calls to its end users as ordinary long-distance calls and has declined to pass through to consumers any of the access-charge savings resulting from its illicit scheme; and even though the FCC has for decades

ruled that protocol conversions such as this have no effect on the regulatory classification of a call or, by extension, the applicability of access charges.

3. On April 21, 2004, moreover, the FCC unanimously rejected AT&T's position that converting a call to IP (and back again) somehow immunizes the call from the access charges that otherwise apply.[1] Particularly in light of the FCC's decision, AT&T has no excuse for its failure to pay lawfully tariffed access charges for all of the long-distance voice traffic it has delivered, and continues to deliver, to SBC for termination.

JURISDICTION AND VENUE

4. This is primarily a collection action for payments arising under section 203 of the Communications Act of 1934, 47 U.S.C. § 203, and SBC's interstate access tariffs filed thereunder. This Court accordingly has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337. In addition, this Court has jurisdiction over SBC's state-law claims pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b), as a substantial part of the events and omissions giving rise to the claims in this Complaint occurred in this judicial district, and defendant AT&T has agents and transacts its affairs in this district.

PARTIES

6. Southwestern Bell Telephone, L.P., is a Texas limited partnership with its principal place of business in Dallas, Texas. Southwestern Bell Telephone, L.P.,

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[1] See Order, *Petition for a Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (Apr. 21, 2004) ("*FCC Access Charge Order*").

provides, among other things, telecommunications services in Missouri, Texas, Kansas, Oklahoma, and Arkansas.

7. Pacific Bell Telephone Company is a California corporation with its principal place of business in San Francisco, California. Pacific Bell Telephone Company provides, among other things, telecommunications services in California.

8. Nevada Bell Telephone Company is a Nevada corporation with its principal place of business in Reno, Nevada. Nevada Bell Telephone Company provides, among other things, telecommunications services in Nevada.

9. Michigan Bell Telephone Company is a Michigan corporation with its principal place of business in Detroit, Michigan. Michigan Bell Telephone Company provides, among other things, telecommunications services in Michigan.

10. Illinois Bell Telephone Company is an Illinois corporation with its principal place of business in Chicago, Illinois. Illinois Bell Telephone Company provides, among other things, telecommunications services in Illinois.

11. Indiana Bell Telephone Company is an Indiana corporation with its principal place of business in Indianapolis, Indiana. Indiana Bell Telephone Company provides, among other things, telecommunications services in Indiana.

12. The Ohio Bell Telephone Company is an Ohio corporation with its principal place of business in Cleveland, Ohio. The Ohio Bell Telephone Company provides, among other things, telecommunications services in Ohio.

13. Wisconsin Bell, Inc. is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Wisconsin Bell, Inc. provides, among other things, telecommunications services in Wisconsin.

14. The Southern New England Telephone Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The Southern New England Telephone Company provides, among other things, telecommunications services in Connecticut.

15. The Woodbury Telephone Company is a Connecticut corporation with its principal place of business in Woodbury, Connecticut. The Woodbury Telephone Company provides, among other things, telecommunications services in Connecticut.

16. AT&T Corp. is a New York corporation with its principal place of business in Bedminster, New Jersey. AT&T Corp. provides, among other things, telecommunications services throughout the United States, including in Missouri. AT&T Corp. can be served with process by serving its registered agent for service of process: The Corporation Company, 120 South Central Avenue, Clayton, MO 63105.

17. AT&T, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T, Inc. can be served with process by serving its registered agent for service of process: The Corporation Company, 120 South Central Avenue, Clayton, MO 63105.

18. AT&T Communications, Inc. is a wholly owned subsidiary of AT&T Corp.

19. AT&T Communications of the Southwest, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of the Southwest, Inc. can be served with process by serving its registered agent for service of process: The Corporation Company, 120 South Central Avenue, Clayton, MO 63105.

20. TCG Kansas City, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Kansas City, Inc. can be served with process by serving its registered agent for

service of process: The Corporation Company, 120 South Central Avenue, Clayton, MO 63105.

21. TCG St. Louis, Inc. is a wholly owned subsidiary of AT&T Corp. TCG St. Louis, Inc. can be served with process by serving its registered agent for service of process: The Corporation Company, 120 South Central Avenue, Clayton, MO 63105.

22. AT&T Communications of Texas, L.P. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Texas, L.P. can be served with process by serving its registered agent for service of process: CT Corporation System, 350 North St. Paul Street, Dallas, TX 75201.

23. TCG Dallas Holdings I, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Dallas Holdings I, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 350 North St. Paul Street, Dallas, TX 75201.

24. TCG Dallas Holdings II, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Dallas Holdings II, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 350 North St. Paul Street, Dallas, TX 75201.

25. Teleport Communications Houston, Inc. is a wholly owned subsidiary of AT&T Corp. Teleport Communications Houston, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 350 North St. Paul Street, Dallas, TX 75201.

26. AT&T Communications of California, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of California, Inc. can be served with process

by serving its registered agent for service of process: CT Corporation System, 818 West Seventh Street, Los Angeles, CA 90017.

27. TCG Los Angeles, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Los Angeles, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 818 West Seventh Street, Los Angeles, CA 90017.

28. TCG Joint Venture Holdings, Inc. is a wholly owned subsidiary of AT&T Corp.

29. TCG San Francisco Holdings I, Inc. is a wholly owned subsidiary of AT&T Corp. TCG San Francisco Holdings I, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 818 West Seventh Street, Los Angeles, CA 90017.

30. AT&T Communications of Nevada, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Nevada, Inc. can be served with process by serving its registered agent for service of process: The Corporation Trust Company of Nevada.

31. AT&T Communications of Michigan, Inc. is a wholly owned subsidiary of AT&T Corp.

32. TCG Detroit Holdings I, Inc., is a wholly owned subsidiary of AT&T Corp.

33. TCG Detroit Holdings II, Inc. is a wholly owned subsidiary of AT&T Corp.

34. AT&T Communications of Illinois, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Illinois, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 208 La Salle Street, Suite 814, Chicago, IL 60604.

35. AT&T Communications of Indiana is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Indiana can be served with process by serving its registered agent for service of process: CT Corporation System, 36 South Pennsylvania Street, Suite 700, Indianapolis, IN 46204.

36. TCG Indianapolis, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Indianapolis, Inc. can be served with process by serving its registered agent for service of process: 208 La Salle Street, Suite 814, Chicago, IL 60604.

37. AT&T Communications of Ohio, Inc. is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Ohio, Inc. can be served with process by serving its registered agent for service of process: CT Corporation, 1300 East 9th Street, Cleveland, OH 44114.

38. TCG New York, Inc. is a wholly owned subsidiary of AT&T Corp.

39. AT&T Communications of Wisconsin I, Limited Partnership is a wholly owned subsidiary of AT&T Corp. AT&T Communications of Wisconsin I, Limited Partnership can be served with process by serving its registered agent for service of process: CT Corporation System, 44 East Miffin Street, Madison, WI 53703.

40. TCG Milwaukee, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Milwaukee, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, 8025 Excelsior Drive, Suite 200, Madison, WI 53717.

41. TCG Connecticut Holdings, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Connecticut Holdings, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, One Commercial Plaza, Hartford, CT 06103.

42. TCG Connecticut Holdings II, Inc. is a wholly owned subsidiary of AT&T Corp. TCG Connecticut Holdings II, Inc. can be served with process by serving its registered agent for service of process: CT Corporation System, One Commercial Plaza, Hartford, CT 06103.

43. The true names and roles of defendants DOES 1-10, inclusive, are unknown to SBC, who accordingly sues those defendants by fictitious names. SBC believes and alleges that each of the DOE defendants is a wholly owned subsidiary of AT&T Corp. and is legally responsible in some manner for the events alleged in this Complaint and the resulting injury and damages caused to SBC. SBC will amend the Complaint to reflect the true names and roles of the DOE defendants when SBC obtains that information.

44. AT&T Corp. and its wholly owned subsidiaries listed above, which are collectively referred to as "AT&T" throughout this complaint, effectively operate as a single enterprise. AT&T has complete control and influence over these subsidiaries. This control and influence includes, among other things, all decisions regarding the services AT&T's subsidiaries provide, the facilities they use, the traffic sent over those facilities, the agreements into which they enter, and the way they market and sell their service. AT&T coordinates one overarching position concerning all of these issues from its corporate headquarters. AT&T and all of its subsidiaries also operate as a single

integrated operation, under a nationwide brand. AT&T has used each of these subsidiaries, individually and collectively, as a subterfuge to assist AT&T in conducting and perpetuating fraud. In particular, AT&T has used these subsidiaries to conceal AT&T's interexchange traffic so that AT&T could avoid paying SBC lawfully tariffed access charges. AT&T routed interexchange traffic over facilities that these subsidiaries had previously obtained for the express purpose of terminating primarily local traffic with SBC. This enabled AT&T to disguise its interexchange traffic from SBC, and, consequently, to avoid being billed access charges for this traffic. For the foregoing reasons, the subsidiaries listed above constitute alter egos of AT&T Corp.

BACKGROUND

The Access Charge Regime

45. This action centers on AT&T's non-payment of lawfully tariffed access charges. These are the fees that long-distance carriers such as AT&T must pay local exchange carriers such as SBC to defray the costs associated with the use of local exchange facilities for originating and terminating long-distance calls. These access charges are established and mandated by federal and state regulations and tariffs.

46. Since the breakup of the Bell System in 1984, the Bell operating companies ("BOCs"), such as SBC, and long-distance carriers, such as AT&T, have played largely distinct roles in the telecommunications industry. The BOCs have primarily carried local calls – *i.e.*, calls between end users located within local calling areas or exchanges. Long-distance carriers have traditionally carried calls between exchanges, on both an intrastate and interstate basis. This long-distance service is known as "interexchange" service.

47. In order to provide interexchange service, long-distance carriers such as AT&T typically establish one or more points of presence (POPs) within a given area. POPs are facilities that provide a point of interconnection between local exchange networks and interexchange networks. When a customer makes an interexchange call, that customer's local exchange carrier (say, SBC) transports the call over the local exchange carrier's network to the POP of the long-distance carrier that the customer has selected (say, AT&T). The long-distance carrier then transports the call from the POP in the area where the calling party is located (*i.e.*, where the call originates) to the POP in the area where the called party is located (*i.e.*, where the call terminates). The called party's local exchange carrier then receives the call from the long-distance carrier, either directly or through an intermediary, and delivers it to the called party.

48. The transmission of an interexchange call from the calling party *to* a long-distance carrier's POP is known as "originating access." The transmission of an interexchange call *from* a long-distance carrier's POP to the called party is known as "terminating access."

49. Federal and state tariffs and regulations dictate the appropriate originating and terminating access charges that apply to a given interexchange call, depending on whether the call is interstate or intrastate. If the call originates in one state and terminates in another, the access charges that apply are set forth in interstate tariffs filed with the FCC. If the call originates and terminates within the same state, the access charges that apply are set forth in intrastate tariffs filed with individual state regulatory commissions.

50. Access charges are set at levels designed to recover the costs of using the local exchange carrier's facilities to complete long distance calls, as well as the overall

costs of providing local telephone service. Intrastate access charges are often higher (in many cases, considerably so) than interstate access charges.

AT&T's Evasion of Lawfully Tariffed Interstate and Intrastate Access Charges

51. AT&T's access-avoidance scheme is accomplished by disguising the true nature of ordinary long-distance calls that AT&T delivers to SBC for termination. For most if not all of these calls, AT&T used IP to carry them over its Internet backbone. As the name implies, IP is a technology that was originally developed for use in connection with the public Internet. Because IP is so efficient at carrying traffic, however, many carriers, including AT&T, have been implementing it on their private networks as well. And, although IP was originally developed to carry data traffic generated by computers, technological advances over the past several years have made it possible to use IP to transmit ordinary voice traffic as well.

52. In this respect, IP technology is simply the latest in an array of transmission technologies used to transmit ordinary telephone calls from one point to another. Some carriers use microwave transmission, others use fiber-optic cables, others use satellites, and still others continue to use the copper wires that have been in use for decades. As the FCC has recognized, the choice of transmission technology makes no difference to the regulatory classification of a telephone call or the applicability of access charges. Thus, under the FCC's longstanding rules, provided that the call begins and ends as an ordinary, circuit-switched telephone call, what technology a carrier elects to use to facilitate its transmission is beside the point for purposes of access charges.

53. Indeed, in order for a long-distance carrier to use an Internet backbone in the transmission of ordinary long-distance voice traffic, it must perform what is known as

a "protocol conversion" on *both* ends of the call. For example, in the case of an AT&T subscriber in Dallas making a call to St. Louis, the call (1) originates on SBC's network in Dallas as an ordinary telephone call, (2) is handed off to AT&T in that format, (3) is converted by AT&T into the IP format, (4) is transmitted by AT&T in the IP format on its Internet backbone for some distance between Dallas and St. Louis (though not necessarily the entire distance), (5) is converted back into an ordinary telephone call by AT&T or a party acting on its behalf, (6) is handed back to SBC in that format, and (7) is delivered to the called party in St. Louis by SBC.

54. In this scenario, neither the calling party in Dallas nor the called party in St. Louis has any idea that their call has been converted to the IP format in the middle. The call is dialed and received in the same manner as any other long-distance call. In fact, although AT&T has been performing these protocol conversions and using IP to transmit an increasing portion of its customers' long-distance telephone calls, it has continued to bills its customers for these calls as ordinary long-distance calls, it has not informed them that this protocol conversion was taking place, and it has *not* stopped paying the *originating* access charges that apply to these calls.

55. AT&T has, however, stopped paying *terminating* access charges for calls that it transmits using IP, by disguising those calls as local calls on the terminating end. As noted above, a long-distance call that AT&T transmits using IP is no different than a long-distance call using any of the other transmission technologies noted above, and SBC performs the same functions over the same facilities to deliver that call to the called party. In fact, SBC ordinarily would not even be aware of whether an interexchange call

it receives from AT&T is transmitted using IP within AT&T's network, provided it is converted back into an ordinary telephone call before it is delivered to SBC.

56. Nevertheless, beginning in or around 2000, AT&T began disguising interexchange calls it delivered to SBC's local exchange networks as local calls, and thereby avoiding payment of the lawfully tariffed access charges that apply to such calls. In the normal course of business, SBC makes available to long-distance carriers such as AT&T exchange access facilities that are designed to receive interexchange traffic for termination. Among other things, these facilities are set up to measure interexchange traffic so that SBC can bill the appropriate access charges for that traffic. AT&T, however, delivered to SBC interexchange voice traffic through facilities that, pursuant to various tariffs and negotiated contracts, are designed to carry *local* traffic, and that accordingly are not set up to measure and bill for interexchange traffic.

57. In many cases, these were facilities that AT&T, or a party acting on AT&T's behalf, already had in place and was at one time using in a lawful manner – that is, for the exchange of local traffic with SBC. Because AT&T provides local telephone service in addition to interexchange service – indeed, AT&T is the largest competitive local carrier in the country – it has many such facilities in place throughout SBC's region.

58. AT&T took these steps knowing that, because the facilities that AT&T used are not configured to carry interexchange traffic – and may not lawfully be used for that purpose – SBC generally has not implemented mechanisms to detect, measure, and bill for any interexchange traffic that traverses them. To ensure that carriers are using these local-only facilities for their intended purpose, SBC relies instead on the restrictions

within its tariffs and agreements and the good-faith representations that carriers make by purchasing facilities under these tariffs and agreements.

59. By design, AT&T's improper call-termination scheme prevented SBC from distinguishing between local traffic that was lawfully terminated on local-only facilities, and interexchange traffic that was unlawfully terminated on these facilities. SBC was thus unable to bill for (or, in many cases, even to detect or measure) a great deal of interexchange voice traffic that AT&T delivered to SBC for termination.

60. AT&T pursued its improper access-avoidance scheme surreptitiously for several years. Then, in the wake of several criminal prosecutions of companies that had unlawfully evaded lawfully tariffed access charges,[2] AT&T sought to cloak its behavior with the imprimatur of the FCC. Specifically, in October 2002, AT&T filed a petition with the FCC requesting that it declare that a telephone call converted to IP, carried on an Internet backbone, and then converted back to an ordinary telephone call for termination was exempt from access charges.[3] AT&T's basic claim was that a 1998 report issued by

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[2] In 2002, the U.S. Department of Justice secured guilty pleas from NTS Communications and two of its officers for "perpetrating a scheme that defrauded Southwestern Bell Telephone of millions of dollars in [intrastate access] fees." Press Release, *Long Distance Provider NTS Communications, Inc. and Two Executives are Charged with Defrauding Southwestern Bell Telephone of Millions in Long Distance Usage Fees*, U.S. Dep't of Justice, Feb. 28, 2002. In 2001, the Department of Justice prosecuted a group of individuals for defrauding Ameritech and AT&T's local service affiliate by operating long-distance companies which "concealed the true nature" of the long-distance traffic they delivered for termination, and by characterizing that traffic instead as local. *See* Indictment, *United States v. Lace Ward, et al.*, Cause No. IP 01-79-CR-01 - 04 (S.D. Ind. filed Jul. 11, 2001). The defendants in that case pleaded guilty to conspiracy to commit wire fraud and were sentenced to prison.

[3] *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (FCC filed Oct. 18, 2002).

the FCC created an access-charge exemption for interexchange traffic that was converted to IP and carried for some portion of the call on AT&T's Internet backbone.

61. AT&T did not, however, wait for the FCC to rule on its petition. Instead, even while its petition was pending, AT&T continued and in fact escalated its practice of improperly terminating long-distance calls to SBC so as to avoid access charges. Although AT&T's petition claimed that it used the IP format to avoid access charges on only a "small fraction" of its interexchange traffic, subsequent investigation has revealed that AT&T has in fact avoided access charges on massive amounts of traffic.

62. Despite the fact that AT&T's scheme was intended to prevent SBC from detecting, measuring, and billing AT&T's improperly terminated interexchange traffic, SBC has, at considerable expense, undertaken a series of studies in an attempt to identify specific instances of AT&T's fraudulent misconduct, and to estimate the overall magnitude of AT&T's scheme. These studies were performed by tracking individual long-distance calls where AT&T is the interexchange carrier and where the end-users on both ends are SBC subscribers. SBC analyzed individual calls to determine how and where they re-entered SBC's network on the terminating end after SBC handed those calls off to AT&T on the originating end. SBC then compiled the instances where interexchange calls carried by AT&T re-entered SBC's network through local-only facilities rather than through facilities for interexchange access, and compared the volume of that improperly routed interexchange traffic to the volume of traffic that AT&T routed properly.

63. These studies – some of which were conducted as recently as this month – have involved millions of minutes of interexchange traffic that AT&T delivered to SBC in Missouri and Texas. They establish, among other things, that:

- From February 2, 2004 through February 8, 2004, AT&T avoided access charges on approximately 16 percent of the interstate and intrastate interexchange traffic AT&T delivered to SBC for termination in Missouri, based on an analysis of more than 700,000 minutes of traffic.

- From October 27, 2003 through November 2, 2003, and again from February 2, 2004 through February 8, 2004, AT&T avoided access charges on more than 23 percent of the interstate and intrastate interexchange traffic that AT&T delivered to SBC for termination in Texas, each period based on an analysis of more than 7 million minutes of traffic.

64. AT&T's widespread use of this unlawful call-termination scheme reflects a gamble that the FCC would grant its petition, and that, as a result, AT&T would be deemed exempt from paying access charges for most if not all of the traffic it has improperly terminated. But AT&T has now lost that bet. As noted at the outset, on April 21, 2004, the FCC unanimously rejected AT&T's petition. *See FCC Access Charge Order, supra*. The FCC declared that, under its longstanding existing rules, AT&T's conversion of ordinary telephone traffic to IP and back again has no effect on the regulatory classification of the telephone call. *See id.* ¶¶ 12-13. The FCC further held that AT&T is required to pay access charges for *all* interexchange voice traffic that originates and terminates over circuit-switched local exchange networks, including traffic that is converted to IP and transmitted over AT&T's Internet backbone at some point in the middle and which is then delivered to SBC over lines reserved for local use. *See id.* ¶¶ 14-20. The FCC accordingly authorized local telephone companies such as SBC to pursue collection actions such as this one against AT&T for access charges that AT&T had failed to pay based on its flawed legal interpretation. *See id.* ¶ 23 n.93.

65. Particularly in light of the FCC's decision, AT&T has no excuse for its failure to pay access charges for the interexchange voice traffic it has transmitted using Internet Protocol in the middle. This traffic is governed by the same federal and state access tariffs that apply to all other ordinary interexchange voice traffic that AT&T terminates with SBC. AT&T must therefore pay the tariffed rates for that traffic, which it has heretofore failed to do.

COUNT I
(BREACH OF FEDERAL TARIFFS)

66. SBC incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 65 of this Complaint.

67. SBC's interstate access charges for long distance calls are set forth in federal tariff Southwestern Bell Telephone Company Tariff F.C.C. No. 73.

68. SBC's interstate access charges for California are set forth in Pacific Bell Telephone Company Tariff F.C.C. No. 1.

69. SBC's interstate access charges for Nevada are set forth in Nevada Bell Telephone Company Tariff F.C.C. No. 1.

70. SBC's interstate access charges for Michigan, Illinois, Ohio, Wisconsin, and Indiana are set forth in Ameritech Operating Companies Tariff F.C.C. No. 2.

71. SBC's interstate access charges for Connecticut are set forth in The Southern New England Telephone Company Tariff F.C.C. No. 39.

72. SBC's federal tariffs provide, among other things, that AT&T must pay SBC access charges for both originating access and terminating access.

73. SBC fully performed its obligations under its federal tariffs, except for those it was prevented from performing, those that it was excused from performing, or those that were waived by AT&T's misconduct as alleged herein.

74. AT&T materially violated SBC's federal tariffs by failing to pay the tariffed rates for the services it used.

75. SBC has been damaged in an amount to be determined at trial.

WHEREFORE, SBC prays for relief as hereinafter set forth.

COUNT II
(BREACH OF STATE TARIFFS)

76. SBC incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 65 of this Complaint.

77. SBC's intrastate access charges for long distance calls in Missouri are set forth in Access Services Tariff P.S.C. Missouri – No. 36.

78. SBC's intrastate access charges for long distance calls in Texas are set forth in Access Services Tariff – Texas.

79. SBC's intrastate access charges for long distance calls in Kansas are set forth in Access Services Tariff – Kansas.

80. SBC's intrastate access charges for long distance calls in Oklahoma are set forth in Access Services Tariff – Oklahoma.

81. SBC's intrastate access charges for long distance calls in Arkansas are set forth in Access Services Tariff – Arkansas.

82. SBC's intrastate access charges for long distance calls in California are set forth in Pacific Bell Schedule Cal. P.U.C. No. 175-T.

83. SBC's intrastate access charges for long distance calls in Nevada are set forth in Nevada Bell Telephone Company d/b/a SBC Nevada Tariff P.U.C.N. No. C.

84. SBC's intrastate access charges for long distance calls in Michigan are set forth in Michigan Bell Telephone Company Tariff M.P.S.C. No. 20R.

85. SBC's intrastate access charges for long distance calls in Illinois are set forth in Illinois Bell Telephone Company Access Services Ill. C.C. No. 21.

86. SBC's intrastate access charges for long distance calls in Ohio are set forth in The Ohio Bell Telephone Company P.U.C.O. No. 20.

87. SBC's intrastate access charges for long distance calls in Wisconsin are set forth in Wisconsin Bell, Inc. Access Service Tariff P.S.C. of W. 2.

88. SBC's intrastate access charges for long distance calls in Indiana are set forth in Indiana Bell Telephone Company, Inc. Tariff IURC No. 20.

89. SBC's intrastate access charges for long distance calls in Connecticut are set forth in The Southern New England Telephone Company Connecticut Access Service Tariff.

90. Each of the tariffs listed above provide, among other things, that AT&T must pay SBC intrastate access charges for both originating access and terminating access.

91. SBC fully performed its obligations under each of the tariffs listed above, except for those it was prevented from performing, those that it was excused from performing, or those that were waived by AT&T's misconduct as alleged herein.

92. AT&T materially violated the tariffs listed above by failing to pay the tariffed rates for the services it used.

93. SBC has been damaged in an amount to be determined at trial.

WHEREFORE, SBC prays for relief as hereinafter set forth.

COUNT III (In the Alternative)
(UNJUST ENRICHMENT)

94. SBC incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 93 of this Complaint.

95. For the reasons set forth above and in the *FCC Access Charge Order*, pursuant to SBC's federal and state tariffs, AT&T is liable to SBC for its failure to pay interstate and intrastate access charges on interexchange traffic that AT&T delivered to SBC for termination. This Count III is pleaded solely in the alternative, in the unlikely event those tariffs are determined not to apply. In no way is this Count III to be construed as an admission that those tariffs do not govern this case.

96. By terminating interexchange calls carried by AT&T to SBC's local telephone customers, SBC permitted AT&T's long-distance subscribers to complete long-distance calls to SBC customers. SBC thereby conferred a benefit on AT&T.

97. AT&T understood that the termination of interexchange calls by SBC was important to AT&T's long-distance customers, and it accordingly appreciated and recognized that SBC's termination of interexchange calls carried by AT&T was a benefit to AT&T.

98. AT&T unjustly accepted and retained the benefit of SBC's call termination services without providing legally required compensation to SBC.

99. SBC has been damaged in an amount to be determined at trial.

WHEREFORE, SBC prays for relief as hereinafter set forth.

COUNT IV
(FRAUD)

100. SBC incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 99 of this Complaint.

101. AT&T committed fraud against SBC in its 13-state territory. Specifically, AT&T knowingly, and with the intent to defraud, made misrepresentations and omissions of material facts, including, but not limited to:

a) AT&T's public statements that sought to minimize the volume of interexchange traffic that it was delivering to SBC and other local exchange carriers for termination without payment of the appropriate access charges.

b) AT&T's representations to consumers, in bills and otherwise, that the interexchange calls that it delivered to SBC over local facilities were in fact long-distance calls subject to access charges.

c) AT&T's routing of interexchange voice traffic through facilities that may be used for terminating only local voice traffic.

d) AT&T's commingling of interexchange voice traffic with local voice traffic using existing facilities.

e) AT&T's express and implied representations that it was using local-only facilities to deliver local traffic, not interexchange traffic, to SBC.

f) AT&T's failure to put SBC on notice with specificity of its practice of avoiding access charges for interexchange traffic in any of the

states in which SBC provides terminating access service, or of the extent to which AT&T adopted this practice.

102. These misrepresentations and/or omissions were false and misleading at the time they were made.

103. AT&T made each of these misrepresentations and/or omissions with knowledge of their falsity or recklessly without regard for their truthfulness as a positive assertion, with the intent to deceive SBC, and with the intent to induce SBC to act in the manner herein alleged.

104. SBC was, in fact, deceived by AT&T's misrepresentations and omissions.

105. SBC reasonably and justifiably relied to its detriment on AT&T's misrepresentations and omissions. Due to AT&T's fraudulent conduct, SBC was unable to bill for (or, in some cases, even to detect or measure) the interexchange traffic that AT&T terminated with SBC on SBC's local network, nor was SBC able to ascertain the volume of interexchange traffic that AT&T was delivering to SBC for termination without payment of access charges. The truth about the scope of AT&T's unlawful conduct accordingly remained within the peculiar knowledge of AT&T, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

106. SBC was damaged as a direct and proximate result of AT&T's misrepresentations and omissions in an amount to be determined at trial.

WHEREFORE, SBC prays for relief as herein set forth.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff SBC prays that this Court grants relief for all misconduct as follows:

a) Money damages to be proven at trial, plus prejudgment interest;

b) Punitive damages;

c) Restitution;

d) All costs and attorney's fees incurred by SBC;

e) Preliminary and permanent injunctive relief enjoining defendants from continuing to engage in the fraud complained of;

f) A full accounting of the number of interexchange minutes improperly sent to be terminated by SBC as local traffic;

g) Indemnification for claims that have been or may be asserted and damages that have been or may be sought by third parties arising in whole or in part from AT&T's wrongful conduct; and

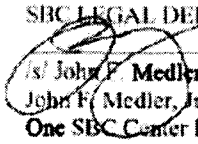
h) Such further relief as this Court deems appropriate and just.

JURY DEMAND

SBC hereby requests a jury trial on all issues and claims.

Respectfully submitted,

SBC LEGAL DEPARTMENT



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Attorneys for Plaintiffs

April 22, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-N-0909 (MJW) DEP. CLK

QWEST CORPORATION,

Plaintiff,

v.

AT&T CORP.;
AT&T COMMUNICATIONS, INC.;
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.;
AT&T COMMUNICATIONS OF THE MIDWEST, INC.;
AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.; and
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.;

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff Qwest Corporation ("Qwest"), through its counsel, Musgrave & Theis LLP, for its Complaint against AT&T Corp., AT&T Communications, Inc., AT&T Communications of the Pacific Northwest, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc., and AT&T Communications of the Southwest, Inc. (collectively "AT&T"), states as follows:

NATURE OF THE ACTION

For several years, AT&T has fraudulently concealed and misrepresented the true nature of long-distance telephone calls passed from its network to Qwest in order to avoid payment of lawful tariffed charges. AT&T is required to pay Qwest for this access to and use of Qwest's local exchange network pursuant to federal and state tariffs filed with the Federal

Communications Commission ("FCC") and state utilities commissions. Beginning as early as 2000 (and possibly even earlier) and continuing through today, AT&T implemented a fraudulent scheme to avoid these tariffed "access charges" by delivering long-distance calls to Qwest as if they were local calls. By disguising long-distance calls as local calls, AT&T violated Qwest's lawful tariffs and defrauded Qwest out of tens of millions of dollars in access charges. In this case, Qwest seeks to recover the access charges that AT&T evaded.

JURISDICTION AND VENUE

1. This lawsuit was filed in part to collect charges due under tariffs filed with and approved by the FCC, and damages caused by the illegal acts of a common carrier subject to the Communications Act of 1934, as amended. This lawsuit therefore arises under Sections 203 and 206 of the Communications Act of 1934, 47 U.S.C. §§ 203, 206, and this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and 47 U.S.C. § 207. This Court has subject matter jurisdiction over Qwest's related state-law claims pursuant to 28 U.S.C. § 1367.

2. Personal jurisdiction is appropriate in this district because a substantial part of the events and omissions giving rise to the claims in this Complaint occurred in this judicial district, AT&T's tortious acts caused Qwest to suffer damages in Colorado, AT&T has agents and property in Colorado, and AT&T routinely transacts business in this district. Fed. R. Civ. P. 4(k)(1)(A); Colo. Rev. Stat. § 13-1-124 (2004). The claims in this Complaint arise in part from these contacts with the State of Colorado.

3. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because a substantial part of the events and omissions giving rise to the claims in this Complaint occurred in this judicial district, and AT&T has agents and transacts business in this district.

PARTIES

4. Qwest Corporation is a Delaware corporation with its principal place of business in Denver, Colorado. Qwest is a "local exchange carrier" providing local (as opposed to long-distance) telephone services to customers throughout a fourteen-state territory comprised of the following states: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

5. Defendant AT&T Corp. is a New York corporation with its principal place of business in Bedminster, New Jersey. AT&T provides, among other things, telecommunications services throughout the United States, including the State of Colorado. AT&T is a long-distance carrier, which means that it carries calls between local telephone exchanges, whether within one state ("intrastate") or between states ("interstate"). In the telecommunications industry, long-distance service is known as "interexchange" service, and long-distance carriers are known as "interexchange carriers." AT&T is a common carrier under the Communications Act of 1934.

6. Defendants AT&T Communications, Inc., AT&T Communications of the Pacific Northwest, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc., and AT&T Communications of the Southwest, Inc., are all wholly-owned subsidiaries of AT&T Corp. These operating subsidiaries provide long-distance services on behalf of AT&T Corp., and they are common carriers under the Communications Act of 1934. As AT&T Corp.'s operating subsidiaries, these Defendants acted jointly with AT&T Corp. in establishing and carrying out AT&T's illegal scheme throughout Qwest's territory.

STATEMENT OF FACTS

A. The Access Charge Regime

7. Since the breakup of the Bell System in 1984, local exchange carriers such as Qwest, and long-distance carriers such as AT&T, have played largely distinct roles in the telecommunications industry. Local exchange carriers have primarily carried local calls, while long-distance carriers have carried calls between local telephone exchanges.

8. To provide interexchange telecommunications services, long-distance carriers such as AT&T typically must interconnect their long-distance networks with the local exchange networks that are actually connected to callers and called parties. For example, when a customer makes an interexchange call, that customer's local exchange carrier transports the call over the local exchange carrier's network to the network of the long-distance carrier that the customer has selected (here AT&T). This part of an interexchange call is known as the "originating" segment.

9. The long-distance carrier then transports the call from the local telephone exchange where the calling party is located to the local telephone exchange where the person receiving the call is located. The called party's local exchange carrier receives the call from the long-distance carrier, either directly or through an intermediary, and delivers it to the called party. This part of the call is the "terminating" segment.

10. Since the caller has caused the networks of the local exchange carrier on each end of the call to be used, and the interexchange carrier is the one who receives payment from the caller, federal and state law require the interexchange carrier to pay the local exchange carriers "access charges" for the use of their networks as set forth in filed and approved tariffs. The

caller's local exchange carrier receives "originating access" charges; the called party's local exchange carrier receives "terminating access" charges.

11. Federal and state tariffs filed by the local exchange carriers set the appropriate originating and terminating access charges for a given interexchange call, depending on whether the call is interstate or intrastate. If the call originates in one state and terminates in another, the access charges are set forth in interstate tariffs filed with the FCC. If the call originates and terminates within the same state, the access charges that apply are set forth in intrastate tariffs filed with the relevant state regulatory commission. Access charges are set at levels designed to recover the costs of using the local exchange carrier's facilities to complete long-distance calls, as well as the overall costs of providing local telephone service.

B. AT&T's Unlawful Evasion of Tariffed Access Charges

12. The access charges that large interexchange carriers such as AT&T must pay local exchange carriers amount to hundreds of millions of dollars each year.

13. Beginning as early as 2000 (and possibly even earlier) and continuing through the present, AT&T implemented a fraudulent scheme to avoid these tariffed access charges. To accomplish this, AT&T uses "Internet Protocol," a transmission method originally developed for transmitting data over the Internet, to transport certain calls over AT&T's network.

14. The scheme works generally as follows, in simplified form. An AT&T long-distance customer places a long-distance call in the usual manner—by dialing 1+ the called party's 10 digit telephone number from a regular telephone. After the call reaches AT&T's network, the call is converted to the Internet Protocol. AT&T then transports the call over its "Internet backbone" (a high capacity data transmission facility). The call is then changed back to

the original telephone protocol before it is handed off to the terminating local exchange carrier (either directly or through an intermediary affiliate of AT&T) for delivery to the called party. Calls transmitted in this manner are delivered to the local exchange carrier through facilities that were acquired for use only for local telephone traffic rather than the facilities that are supposed to be used for interexchange call termination.

15. From the perspective of the caller and the called party, the call is dialed, received, and billed to the caller in the same manner as any other long-distance call. Customers do not know that the Internet Protocol is used to transport their long-distance calls.

16. From the perspective of AT&T, terminating access charges are eliminated. AT&T instead pays the lower rate for terminating local calls. AT&T's customers, however, are billed at the same rate as if the call is an ordinary long-distance call. AT&T retains the value of the access charges that it has avoided paying to local exchange carriers.

17. From the perspective of Qwest and other terminating local exchange carriers, the long-distance nature of the calls is effectively concealed. AT&T therefore is not assessed the terminating access charges that should be charged for these calls.

18. AT&T intentionally concealed its long-distance calls as local calls knowing that Qwest would not be able to bill the appropriate access charges as a result. In certain cases AT&T acted in concert with another local exchange carrier to deliver long-distance traffic to Qwest in a manner that disguised the traffic as local calls so that access charges would not be imposed on AT&T. AT&T and these other local exchange carriers jointly established and carried out this illegal scheme, causing Qwest to incur damages as the proximate result.

19. As a result of AT&T's fraud and concealment, Qwest has been unable to bill AT&T for the terminating access charges to which Qwest is entitled under its lawful and binding tariffs.

20. Charges for local calls are significantly lower than tariffed terminating access charges for long-distance calls. In many instances Qwest and other local exchange carriers are paid nothing for terminating some calls under the compensation regime devised by AT&T.

21. The FCC has long recognized that the choice of transmission technology makes no difference to the regulatory classification of a telephone call or the applicability of access charges. Under the FCC's longstanding rules, any interexchange call that begins and ends as an ordinary telephone call is subject to access charges regardless of the technology a carrier elects to use to facilitate its transmission.

22. Over time, certain local exchange carriers, such as Verizon and Sprint, began to discover that AT&T was unlawfully evading access charges. AT&T then revealed its scheme by seeking approval by the FCC. Specifically, in October 2002, AT&T filed a petition with the FCC requesting that it declare that a telephone call converted to Internet Protocol, transported to its destination, and then converted back to an ordinary telephone call for termination was exempt from access charges. (AT&T's Petition for Declaratory Ruling is attached as Exhibit A).

23. Although AT&T's Petition claimed that it used the Internet Protocol format to avoid access charges on only a small fraction of its interexchange traffic, AT&T has in fact avoided access charges on massive amounts of traffic in this manner.

24. On April 21, 2004, the FCC unanimously rejected AT&T's Petition and reaffirmed that AT&T's conversion of ordinary telephone traffic to Internet Protocol and back

again has no effect on the classification of the telephone call for the purpose of assessing access charges. In summary, the FCC found as follows:

> End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls.

Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, FCC 04-97 ¶ 15 (April 21, 2004) (The Order is attached as Exhibit B). The FCC therefore reaffirmed that AT&T must pay access charges for all interexchange voice traffic that originates and terminates on local exchange networks under pre-existing law and current regulatory rules.

25. AT&T has no excuse for its failure to pay access charges for the interexchange voice traffic it transmits using Internet Protocol. This traffic is governed by the same federal and state access tariffs that apply to all other long-distance voice traffic. AT&T must therefore pay the full tariffed access rates for that traffic. AT&T has failed to do so, and it owes Qwest at least tens of millions of dollars in access charges.

FIRST CLAIM FOR RELIEF
Breach of Federal Tariffs

26. Qwest incorporates the preceding paragraphs of the Complaint as if set forth here.

27. Qwest's interstate access charges for long-distance calls are set forth in federal tariffs filed with and approved by the FCC. These tariffs carry the force of law.

28. Qwest's federal tariffs provide, among other things, that AT&T must pay Qwest interstate originating and terminating access charges. Qwest is legally bound to charge the tariffed rate and AT&T is legally bound to pay it.

29. Qwest fully or substantially performed its obligations under its federal tariffs, except for those it was prevented from performing, those that it was excused from performing, or those that were waived by AT&T's misconduct.

30. AT&T materially violated Qwest's federal tariffs by failing to pay the tariffed rates for the access services it used.

31. Qwest has not filed a claim to recover these charges with the FCC.

32. Qwest has been damaged in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF
Breach of State Tariffs

33. Qwest incorporates the preceding paragraphs of the Complaint as if set forth here.

34. Qwest's intrastate access charges for long-distance calls are set forth in tariffs filed with and approved by the appropriate regulatory bodies in each of the following states: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. These tariffs carry the force of law.

35. Each of these tariffs provide, among other things, that AT&T must pay Qwest intrastate originating and terminating access charges. Qwest is legally bound to charge the tariffed rates and AT&T is legally bound to pay them.

36. Qwest fully or substantially performed its obligations under its state tariffs, except for those it was prevented from performing, those that it was excused from performing, or those that were waived by AT&T's misconduct.

37. AT&T materially violated Qwest's state tariffs by failing to pay the tariffed rates for the services it used.

38. Qwest has been damaged in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF
Alternative Claim for Unjust Enrichment

39. Qwest incorporates the preceding paragraphs of the Complaint as if set forth here.

40. This claim for relief is pleaded solely in the alternative, in the unlikely event the previously discussed tariffs are determined not to apply.

41. By terminating interexchange calls carried by AT&T to Qwest's local telephone customers, Qwest permitted AT&T's long-distance subscribers to complete long-distance calls.

42. AT&T's long-distance customers compensated AT&T for completing their long-distance calls. Qwest thereby conferred a benefit on AT&T.

43. AT&T understood that Qwest's termination of interexchange calls was important to AT&T's long-distance customers, and AT&T accordingly appreciated and recognized that Qwest's termination of interexchange calls conferred a benefit on AT&T.

44. AT&T accepted and retained the benefit of Qwest's call termination services.

45. It would be unjust to permit AT&T to accept and retain the benefit of Qwest's call termination services without compensating Qwest as required by law.

46. Qwest has been damaged in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF
Fraudulent Misrepresentation & Concealment

47. Qwest incorporates the preceding paragraphs of the Complaint as if set forth here.

48. AT&T committed fraud against Qwest in each of the states in which Qwest acts as a local exchange carrier, specifically in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

49. AT&T knowingly, and with the intent to defraud, made misrepresentations and omissions of material facts, including, but not limited to:

(a) AT&T's attempt to minimize the apparent volume of interexchange traffic that it was delivering to Qwest for termination without payment of the appropriate access charges;

(b) AT&T's concealment and disguising of the nature of the calls being terminated by Qwest for AT&T's customers;

(c) AT&T's representations that the interexchange calls that it delivered to Qwest over local facilities were in fact local calls that were permitted to be delivered over Qwest's local services and "local interconnection service" trunks and were not subject to access charges;

(d) AT&T's routing of interexchange voice traffic through facilities that may be used for terminating only local voice traffic;

(e) AT&T's commingling of interexchange voice traffic with local voice traffic using existing facilities with intent to conceal the interexchange nature of the interexchange calls; and

(f) AT&T's express and implied representations that it was using local-only facilities to deliver local traffic, not interexchange traffic;

50. These representations were false and misleading at the time they were made and caused Qwest to reach false conclusions as to the interexchange traffic from AT&T that was being terminated by Qwest. AT&T's omissions also caused Qwest to reach false conclusions as to the interexchange traffic from AT&T that was being terminated by Qwest.

51. AT&T made each of these misrepresentations and omissions with knowledge of their falsity or recklessly without regard for their truthfulness, with the intent to deceive, and with the intent to induce Qwest to terminate its interexchange calls without imposing access charges.

52. Qwest was deceived by AT&T's misrepresentations and omissions.

53. Moreover, AT&T was under a duty to reveal to Qwest that calls Qwest was terminating for AT&T as local traffic was in fact interexchange traffic. AT&T intentionally and fraudulently concealed this information from Qwest so that Qwest would not charge AT&T terminating access charges for this traffic.

54. Qwest reasonably and justifiably relied to its detriment on AT&T's misrepresentations and omissions. Due to AT&T's fraudulent conduct, Qwest was unable to bill for the interexchange traffic that AT&T terminated on Qwest's local network. The truth about AT&T's unlawful conduct remained within the peculiar knowledge of AT&T, which engaged in deceptive acts calculated to mislead and thereby obtain an unfair advantage.

55. Qwest was damaged as a direct and proximate result of AT&T's misrepresentations, omissions, and concealment in an amount to be determined at trial.

56. AT&T's actions were willful and wanton, and done with reckless disregard for Qwest's rights, entitling Qwest to an award of exemplary damages.

WHEREFORE, Plaintiff Qwest respectfully requests that the Court enter judgment in its favor and against AT&T, and that it grant Qwest the following relief:

(a) Damages in an amount determined at trial;

(b) Punitive or exemplary damages in an amount determined at trial;

(c) Attorney's fees and costs to the extent authorized by law or tariff;

(d) Pre-judgment interest, including moratory interest; and

(e) Such other and further relief as the Court deems appropriate.

JURY DEMAND

Qwest hereby demands a jury trial on all issues and claims so triable.

DATED this 5th day of May, 2004.

Respectfully submitted,

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